

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JOHN KOHNS,

Defendant-Appellant.

UNPUBLISHED

April 12, 2005

No. 251327

Oscoda Circuit Court

LC Nos. 00-000664-FC;

01-006687-FH

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted on pleas of no contest to attempted second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(ii) (relationship), and guilty to attempted absconding or forfeiting bond, MCL 750.199a. He was sentenced to 24 to 60 months' imprisonment for the attempted CSC II conviction, and 12 to 24 months' imprisonment for the attempted absconding or forfeiting bond conviction, with the sentences to run consecutively. Defendant filed a delayed application for leave to appeal with this Court that was denied for lack of merit. Our Supreme Court remanded the case back to this Court as on leave granted after holding it in abeyance pending the Court's decision in *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). We affirm, but remand for completion of a guidelines departure form.

Defendant first claims that the trial court erred in its departure from the sentencing guidelines. We disagree. In reviewing a departure from the guidelines range, we review the existence of a particular factor as a factual determination for clear error, the determination that the factor is objective and verifiable as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure, and the degree of the departure, for an abuse of discretion. *Babcock, supra* at 264-265. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

Defendant argues that the trial court lacked substantial and compelling reasons for departing from the sentencing guidelines with respect to each conviction. We disagree. Pursuant to the sentencing guidelines act, MCL 769.31 *et seq.*, a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for departure and the court states that reason on the record. MCL 769.34(3); *Babcock, supra* at 255-256. A reason is substantial and compelling when it meets the following criteria: (1) it is objective and verifiable;

(2) it keenly or irresistibly grabs the attention of the court; (3) it is of considerable worth in deciding the length of a sentence; and (4) it exists only in exceptional cases. *Id.* at 257-258. If a trial court finds that there are substantial and compelling reasons to believe that sentencing the defendant within the guidelines range is not proportionate to the seriousness of defendant's conduct and criminal history, then the trial court should depart from the guidelines. *Id.* at 264. However, any departure by the trial court must be proportionate to both the seriousness of the defendant's conduct and the defendant's criminal record. *Id.*

The trial court departed from the sentencing guidelines for the attempted CSC II conviction on the basis of its finding that defendant committed the completed offense of CSC II, and because the guidelines did not adequately address the age of the victim, the relationship between defendant and the victim, or the impact on the victim of the sexual contact within her family and home.

The trial court properly considered that defendant committed the completed act of CSC II. By pleading guilty to a lesser charge, a defendant receives the benefit of having the maximum penalty limited, and "where the undisputed facts show a higher offense [has been committed], departure is justified on that basis." *People v Butts*, 144 Mich App 637, 640; 376 NW2d 176 (1985). Therefore, the trial court committed no error when it based its decision to depart, in part, on the fact that the undisputed testimony of the victim showed that defendant committed the completed act of CSC II.

We further find that the trial court's remaining reasons for departure, i.e., the age of the victim, the relationship between defendant and the victim, and the impact on the victim and her siblings from the sexual contact within the family, meet the criteria set forth in *Babcock*. The trial court's reasons were objective and verifiable. *People v Ambramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Defendant's sexual contact with his stepdaughter while she was a young child, and the life long impact that it will have on the victim and her siblings, keenly and irresistibly grab our attention. Additionally, these are all reasons that are of considerable worth in deciding the length of a sentence for attempted CSC II. Lastly, sexual contact between a stepfather and his middle school-aged stepdaughter within the family home that results in a severe impact on the family as a whole only occurs in exceptional attempted CSC II cases. Therefore, we conclude that the trial court had substantial and compelling reasons to depart from the sentencing guidelines.

Defendant also argues that the trial court erred in its departure because it violated MCL 769.34(3)(b) when it relied on factors already considered under the guidelines, such as the impact of the crime, the victim's youth, and the familial relationship between defendant and the victim. We disagree. MCL 769.34(3)(b) states that a trial court cannot base its departure on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." The trial court found, based on facts in the record, that the guidelines did not adequately address the age of the victim, the relationship between defendant and the victim, and the impact on the victim and her siblings of the sexual contact within their home. We see no error in this determination. The court based its decision to depart on the reasonable conclusion that the guidelines range did not reflect a proportionate punishment for the

crime committed by defendant. Therefore, we conclude that the trial court's departure did not violate MCL 769.34(3)(b).

The trial court departed from the sentencing guidelines for the attempted absconding on bond conviction on the basis of its finding that defendant fled the state and tried to establish a different identity. We again conclude that the trial court's reasons for departure are substantial and compelling. The trial court's reasons are objective and verifiable. *Ambramski, supra* at 74. Further, defendant's flight to another state and assumption of a new identity keenly and irresistibly grab our attention because this conduct went beyond that of the average absconder. The reasons are of considerable worth in deciding the length of the sentence for attempted absconding on bond, as they show the great lengths to which defendant was willing to go to evade the charges against him. Lastly, fleeing to another state and taking on a new identity are things that happen only in exceptional cases. Therefore, we conclude that the trial court had substantial and compelling reasons to depart from the sentencing guidelines.

Finally, regarding defendant's argument that the trial court erred in not filling out the appropriate departure evaluation form, we agree. However, such a defect does not require resentencing, but merely requires remand to the trial court to complete that task. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

Defendant next claims that the trial court's decision to score ten points under offense variable (OV) 19 for both cases was improper. We review de novo the application of the statutory sentencing guidelines. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003).

OV 19 allows for ten points to be scored when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). A trial court's scoring determinations will be upheld if there is any evidence to support the decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that the drafters of the sentencing guidelines did not intend that points would be assessed under OV 19 in the case of absconding on bond because, in cases where "assessment of points for conduct that reflects only the bare nature of the offense and does not in any way involve aggravating circumstances, [they] took care to eliminate these instances of double-counting." However, defendant cites no case law to support this argument. Further, MCL 777.49(c) includes no such exception for absconding or attempted absconding crimes.

Defendant next argues that it was error for the trial court to assess points under OV 19 in this case for both offenses for the exact same conduct because this was not a case where there was "one continuum of conduct." In *Cook, supra* at 641, this Court approved the assessment of points under OV 19 for both the offenses of assault with intent to do great bodily harm and fleeing and eluding because the crimes involved "one continuum of conduct." Double assessment was allowed in that case because the "Legislature could have expressly prohibited sentencing courts from considering facts pertinent to the calculation of the sentencing guidelines range for one offense from being also used to calculate the sentence guidelines range for another offense, but it did not do so." *Id.* In *Cook*, the defendant's flight from the police immediately followed the assault. In this case, defendant's crimes did not constitute "one continuum of conduct." Defendant absconded months after the CSC occurred. Assuming arguendo that it was

therefore improper for the court to assess points under OV 19 for the attempted CSC II offense, we conclude that the error was harmless.

Without the assessment of the ten points under OV 19, defendant's minimum range for the attempted CSC II offense would have been 0 to 9 months, rather than 0 to 11 months. Because correction of the trial court's error results in the lowering of defendant's minimum guidelines range, the error cannot be considered harmless unless the trial court would have imposed the same sentence absent this scoring error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). Given the reasons for, and the extent of, the court's departure from the guidelines, and the minimal difference between the disputed minimum guidelines ranges in this case, we conclude that the trial court's error is harmless because it is manifest that the two months difference would not have affected the trial court's decision to depart, or its sentence.

Lastly, defendant challenges his sentences under *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, ___ US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005). However, our Supreme Court has found that *Blakely* does not apply to a trial court's determination of the minimum portion of an indeterminate sentence under Michigan's sentencing guidelines scheme, and like *Blakely*, *Booker* addresses the constitutionality of a court's imposition of a maximum term of imprisonment. *People v Claypool*, 470 Mich 715, 730-731 n 14 (opinion by Taylor, J.), 738-740 (opinion by Corrigan, C.J., concurring in part and dissenting in part), 741 (opinion by Cavanagh, J., concurring in part and dissenting in part), 744 (opinion by Weaver, J., dissenting in part and concurring in part), 744 n 1 (opinion by Young, J., concurring in part and dissenting in part); 684 NW2d 278 (2004). Accordingly, defendant's argument must be rejected.

Defendant's convictions and sentences are affirmed. The case is remanded for completion of a guidelines departure form. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot